

SC94526

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IN THE MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER C. CLAYCOMB,

Appellant.

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Appeal from Clay County Circuit Court  
43rd Judicial Circuit  
The Honorable J. Bartley Spear, Jr., Judge

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## ARGUMENT

Appellant, Christopher C. Claycomb, relies on the argument set forth on pages 13-35 of Appellant's Brief but also makes the following additional reply to the issues raised in Respondent's Brief.

### *Point I*

Both Appellant and Respondent agree there is zero evidence of in-kind support or payments through third parties in this case (Resp. Brief 15-16). The question before this Court is whether it is the prosecution's or the defense's burden to introduce evidence of in-kind support or third-party arrangements at trial. If in-kind support and third-party arrangements are included in the support element, then it was the State's burden to prove Mr. Claycomb did not provide these. *State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005) ("it is always the State's burden to establish a factual basis for elements of the crime charged"). If in-kind support or third-party arrangements are merely available as a defense to rebut a *prima facie* case, then it was the defense's obligation to produce this evidence.

Respondent cites to a series of nonsupport cases from other states, pointing out that in those states the prosecution may make a *prima facie* case of nonsupport by showing the defendant failed to pay child support, which would then leave it up to the defendant to rebut the State's case with evidence of in-kind support or third-party arrangements (Resp. Br. 20-22). Respondent's argument misses the mark in that it ignores statutory differences and Missouri case law.

Respondent points out that in Alaska, the failure to pay child support “constitutes at least *prima facie* evidence of failure to provide ‘support’” (Resp. Br. 22 (quoting *Taylor v. State*, 710 P.2d 1019 (Alaska. App. 1985)). Alaska’s nonsupport statute specifically took its definition of support from Alaska’s child support statute, thus creating a cross-reference between the two statutes. *Taylor*, 710 P.2d at 1022 (quoting Commentary on Alaska Revised Criminal Code (citing *Johansen v. State*, 491 P.2d 759 (Alaska 1971))). Missouri’s nonsupport statute, however, contains no such cross-reference. Compare § 568.040 with § 452.340.

Respondent points out that in Nevada, the State has “[n]o affirmative burden to disprove in-kind assistance” in a nonsupport prosecution (Resp. Br. 21 (citing *Epp v. State*, 814 P.2d 1011, 1013 (Nev. 1991)). The Nevada Supreme Court has “concluded that the phrase ‘support and maintenance’ [as used in the nonsupport statute] means any court-ordered legal obligation to pay child support.” *Sheriff, Washoe County v. Vlasak*, 888 P.2d 441, 443 (Nev. 1995) (citing *Epp*, 814 P.2d at 1013). The Nevada Supreme Court was able to arrive at this definition because there is no definition of support given in the nonsupport statute. *See Id.* This is not true under Missouri’s nonsupport statute where “support” is specifically defined as “food, clothing, lodging, and medical or surgical attention.” § 568.040. Where a statute, itself, defines a word, “That definition controls.” *State ex rel. Boone Ret. Ctr., Inc. v. Hamilton*, 946 S.W.2d 740, 742 (Mo. banc 1997).

Respondent points out an Indiana appellate court used language that suggested it was the defendant’s responsibility to raise the issue of in-kind support in a nonsupport

prosecution: “[Defendant] has never asserted that he provided his child with food, clothing, shelter, or medical care so as to relieve him of criminal liability for nonsupport.” *Gustman v. State*, 660 N.E.2d 353, 356 (Ind. Ct. App. 1996). In attempting to apply *Gustman* to this case, Respondent ignores that *Gustman* involved a challenge to the factual basis to support a guilty plea, not a challenge to the sufficiency of the evidence after a trial. *Id.* The Indiana Supreme Court has specifically rejected attempts to apply sufficiency challenges to factual basis challenges, because “the test necessary to prove a sufficient factual basis to support a guilty plea is not the same as that required to support a conviction. . . . ‘Reasonably concluding’ guilt is not the same as concluding guilt beyond a reasonable doubt.” *Rhoades v. State*, 675 N.E.2d 698, 702 (Ind. 1996). Missouri courts have similarly rejected attempts at direct application of sufficiency cases to factual basis cases due to the differing standards. *Simmons v. State*, 429 S.W.3d 464, 470 (Mo. App. E.D. 2014).

By citing to the definition of nonsupport crimes in other jurisdictions, Respondent not only ignores important statutory differences but also previous Missouri cases specifically construing “support,” under Missouri's nonsupport statute, to include in-kind and other forms of support. *State v. Holmes*, 399 S.W.3d 809, 815 (Mo. banc 2013) (“Here, it is uncontested that he provided absolutely no monetary support for his son and no *in-kind support* other than to feed and house the child during those days on which he had custody”) (emphasis added); *State v. Coe*, 233 S.W.3d 241, 243 (Mo. App. S.D. 2007) (“Thereafter, during the period from May 1, 2004, to May 1, 2005, mother received no support for the children directly from defendant or any *in-kind support* from

him”) (emphasis added); *Bequette v. State*, 161 S.W.3d 905, 908 (Mo. App. E.D. 2005) (“*other forms of support*, such as providing food and clothing, can constitute support under the criminal non-support statute”) (emphasis added); *State v. Nichols*, 725 S.W.2d 927, 930 (Mo. App. E.D. 1987) (“The evidence, however, did not establish: (1) whether defendant also provided room and board, books, weekend meals and transportation; (2) whether defendant supplied Tammy with other monies or other items of statutory “support” such as clothing; or, (3) whether defendant contributed support to Tammy directly.”).

Respondent next complains that requiring the State to prove the defendant did not provide any in-kind support or make third-party arrangements “would be an unreasonable burden” and should be the defendant’s responsibility to inject into a case, because it “is Defendant who is in the best position” to produce such evidence (Resp. Br. 19). Respondent again ignores the statute which defines “support” as “food, clothing, lodging, and medical or surgical attention” and to be guilty of nonsupport, the State must prove the defendant did not provide “support.” § 568.040. A plain reading of the statute and case law leave no doubt support includes direct payments to, or arrangements with, third parties and in-kind support. *Holmes*, 399 S.W.3d at 815; *Bequette*, 161 S.W.3d at 908. Under no standard does prosecutorial convenience trump due process or the plain meaning of statutes. *See Com. v. Clark*, 279 A.2d 41, 45 (Pa. 1971) (“It might be equally or even more ‘convenient’ for a prosecutor to dispense with juries in criminal trials, but no one would seriously suggest that this would warrant the suspension of the constitutional right to trial by jury.”).

Based on the statutory definition of support and prior Missouri case law, “support” is not limited to court ordered child support. Support includes third-parties arrangements, in-kind support, and direct payments. *Holmes*, 399 S.W.3d at 815; *Bequette*, 161 S.W.3d at 908; § 568.040. Insomuch third-party arrangements and in-kind support are included in the element of support, it was the State’s burden to provide sufficient evidence to support a finding that Mr. Claycomb provided no “support” not just that he failed to pay his child support or make direct monetary payments. *Self*, 155 S.W.3d at 762. The record in this case is devoid of evidence that Mr. Claycomb failed to provide in-kind support or make payments to third parties. Accordingly, the State failed to meet its burden and there is insufficient evidence to find Mr. Claycomb failed to provide support.

#### *Point II*

Citing to *State v. Holmes*, 399 S.W.3d 809, 815 (Mo. banc 2013), and *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006), Respondent argues the existence of a child support order is sufficient to establish what constitutes adequate support (Resp. Br. 22-23). To the extent the language relied upon by Respondent in *Holmes* and *Reed* can be read as broadly as Respondent presents it, this Court should reevaluate the language used in those case.

Equating the amount due under a child support order with “support” as defined by § 568.040, is problematic. They are not the same thing. Without putting the Form 14 and the dissolution or paternity judgment into evidence, there is no evidence of what the child support amount actually represents. Child support is not limited to “food, clothing, lodging, and medical or surgical attention.” § 568.040. Child support is much broader:

‘Other extraordinary child-rearing costs’ may include, but are not limited to, the cost of tutoring sessions, special or private elementary and secondary schooling to meet the particular educational needs of a child, camps, lessons, travel or other activities intended to enhance the athletic, social or cultural development of a child.

An order may include the cost of tuition, room and board, books, fees and other reasonable and necessary expenses.

*Nelson v. Nelson*, 195 S.W.3d 502, 513 (Mo. App. W.D. 2006) (quoting Form 14, Line 6e, Comment A). Additionally, parties are free to negotiate deviations from the Form 14 amount so long as the court finds the presumed amount of child support is unjust and inappropriate. *See Pratt v. Ferber*, 335 S.W.3d 90, 97 (Mo. App. W.D. 2011) (discussing that the parties negotiated aspects of child support in their dissolution decree).

Based on the record in this case, nobody can say with any authority, and there can be no reasonable inferences of, what the \$247.00 per month in child support Mr. Claycomb was ordered to pay represents. Without the Form 14 and dissolution judgment in evidence, there is no evidence the \$ 247.00 per month in child support represented adequate support for “food, clothing, lodging, and medical or surgical attention.” § 568.040.

## CONCLUSION

Based on the argument presented above and in Appellant's Brief, Mr. Claycomb respectfully requests this Court reverse the judgment of the trial court and remand the case with instructions for the court to vacate and set aside the judgment and discharge Mr. Claycomb from his sentence.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Damien de Loyola, hereby certify as follows:

The attached reply brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, this brief contains **1,848** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the attached brief was placed for delivery through the e-filing system on February 1, 2015 to: Gregory Barnes, Office of the Attorney General, at Greg.Barnes@ago.mo.gov.

/s/ Damien de Loyola  
Damien de Loyola